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HAROLD B. WILLEY, Cle

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 523

UNITED INSURANCE COMPANY OF CHICAGO, ILLINOIS, a corporation, CHARLES JOSEPH, SAM JOSEPH and LOUIS HIRSCHORN,

Petitioners,

vs.

JOHN R. MALONEY, individually and as Insurance Commissioner of the State of California,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the District Court of Appeal of the State of California, First Appellate District, Division One.

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to the District Court of Appeal of the State of California, First Appellate District, Division One.

QUESTIONS PRESENTED.

The first question presented by the petitioner assumes intentional and deliberate discrimination by the petitioner. (Pet. for Writ of Cert., p. 3.) As will be pointed out below in our Statement of the Case, the assumption is without warrant, such discrimination being claimed by petitioner and evidence—by affidavits—thereon being introduced by both parties. The opinion sought to be reviewed properly treats the question of discrimination as undecided. Consequently the initial "Where" in the first question should read "Where petitioner asserts."

The second question presented also makes an incorrect statement of fact, a statement that the Insurance Commissioner had "before the hearing commenced, stated under oath that he knows the charge of discrimination is unfounded." (Pet. for Writ of Cert., p. 4.) In our argument below we shall point out that no such statement was made by the Commissioner. Consequently the parenthesized matter should be deleted from the second question.

STATEMENT OF THE CASE.

The petitioner states the case as though all the assertions made in its supporting affidavits before the trial Court had been proved or conceded by the Commissioner. On the contrary there were a number of affidavits in opposition. (Exhibits B-K.)

These affidavits in opposition, we believe, stated facts which would have destroyed the claim of intentional discrimination made by petitioner.

Petitioner apparently founds its statement in this fashion upon the theory that the Commissioner conceded the fact on appeal (Pet. for Writ of Cert., pp. 9-10) and that the grant of the preliminary injunction (pendente lite) had the effect of implied findings (Pet. for Writ of Cert., p. 10) (in California practice no findings of fact are made on an order granting preliminary injunction).

The quotations from the Commissioner's Opening Brief before the California District Court of Appeal and in his Answer to the Petition for Rehearing before that Court, set forth on pages 9 and 10 of the Petition for Writ of Certiorari herein, do not establish any of the "concessions" (Pet. for Writ of Cert., p. 10) claimed by Petitioner, nor were any such concessions made. The basis of the appeal was the narrow ground that the trial Court did not have jurisdiction to entertain petitioners' action because petitioner had failed to exhaust administrative remedies. Consequently the quoted portion of the Commissioner's Opening Brief pointed out that the merits of petitioner's cause of action, if any, were not in issue on the appeal. The quotation from the Commissioner's Answer to the Petition for Rehearing is an excellent example of distortion by lifting a sentence from context. The quoted sentence was followed by the following which petitioner fails to quote:

> "Defendant and appellant's contention was that the alleged losses, if they existed, did not constitute the kind of damage which justified equitable intervention, and the opinion adopted appellant's contention on the basis of a series

of cases which are directly in point." (Answer to Pet. for Rehear., p. 2, lines 13-17.)

Likewise, the inference of "implied findings" of fact by the trial Court (Pet. for Writ of Cert. p. 10) was advanced by petitioner in its petition for rehearing by the District Court of Appeal (Pet. for Rehear. pp. 5-6, 9) and was there answered by the Commissioner as follows:

> "The second point raised by the petition for a rehearing relies upon allegation and proof by respondents that the calling of a hearing against them was discriminatory and a legal wrong.
>
> "But this is to confuse the law regarding preliminary injunctions:
>
> 'The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or should not be restrained from exercising the rights claimed by him.' (14 Cal. Jur. 184; *Bomberger v. McKelvey,* 35 Cal. 2d 607, 612, 220 Pac. 2d 729; *State Compensation Ins. Fund v. Maloney,* 121 A.C.A. 49, 59, 262 Pac. 2d 662.)
>
> "To assert that the plaintiff 'proved' that the accusatory hearing was discriminatory and a legal wrong, is to entirely mistake the effect of the preliminary injunction. It is to assume the answer on the merits. The effect of the preliminary injunction was merely a determination of the court that *in its opinion* sufficient of a show-

ing had been made by plaintiff to entitle it *to exercise its discretion* to suspend the administrative proceeding by injunction pending a trial on the merits. The opinion here under attack merely holds that he did not have that discretion in the absence of an administrative order, the operation of which would irreparably injure the respondent pending trial on the merits." (Answer to Pet. for Rehear. p. 3, line 16 to p. 4, line 19.)

A glance at the opinion sought to be reviewed also shows that the District Court of Appeal had taken this view of the matter. In summarizing the record it carefully avoided any statement that either the charges in the accusation filed before the Commissioner or the allegations made in the complaint before the trial Court were true or untrue. (Pet. for Writ of Cert. p. vi.) Toward the close of the opinion, the Court refers to principle that equity will enjoin arbitrary and discriminatory enforcement of a criminal statute by criminal proceedings and comments "But that is a long way from holding that *because of charges* that an administrative officer is acting arbitrarily and in a discriminating manner in holding an investigatory hearing, the Courts may interfere". (Pet. for Writ of Cert. p. xviii; emphasis supplied.)

ARGUMENT.

The two federal questions asserted by petitioner at the beginning of its "Argument" (Pet. for Writ

of Cert. pp. 12-13) are likewise vitiated by the same factors as vitiate substantially the same subject matter under its caption "Questions Presented for Review", and emphasized in petitioner's second purported federal question on argument, the assumption that the Insurance Commissioner has stated on oath that there is no merit to the charge of discrimination. The affidavits—the only oath-bound statements of the Insurance Commissioner—are very expressly limited to facts of which he has personal knowledge (Exhibits B and G). Under our California law the department staff and Commissioner himself would be subject to subpoena, on behalf of the accused, to examine them at the hearing on the actual existence of these facts, before a hearing officer from outside the Insurance Department. (Cal. Gov. Code 11512.) The evidence so adduced would be subject to subsequent judicial re-evaluation *both as to preponderance and sufficiency.* (Cal. Code Civ. Proc. sec. 1094.5; *Moran v. Board of Medical Examiners*, 32 Cal. 2d 301, 196 Pac. 2d 20.) The Commissioner's statements thus made are that the issuance of the accusation had been pursuant to a department policy by authority vested in staff members (Ex. B, page 4, lines 7-12), and that he has not instructed anyone not to proceed against other companies. He does not express himself on the merits of the petitioner's claim of discrimination. If petitioner's claim of discrimination is bottomed upon an asserted intention of the Commissioner not to bring accusations against other companies and upon an alleged issuance of the accusation without authority, these statements would be relevant,

of course, but not conclusive on the merits. If the claim is based in fact upon an actual failure of the Commissioner to act against other companies, the actual record of departmental action would be the only really relevant question; as indeed such a record might well be so conclusive as to make the *intention* of the Commissioner academic! In any event certainly the affidavits of the Commissioner are in no sense a statement, under oath or otherwise, as to the merit or demerit of the charges of discrimination.

Generally, the Insurance Commissioner properly rests his contention, that no federal question is presented, upon the cases in United States Courts, including this Court, cited in the opinion of the California District Court of Appeal.

However, there is a separate and independent defense as to any federal question. Here, in the event of punitive action by the Insurance Commissioner after administrative hearing, section 1094.5 of the California Code of Civil Procedure affords a complete review by judicial means of the whole matter. (*Moran v. Board of Medical Examiners, supra; Hohreiter v. Garrison*, 81 Cal. App. 2d 384, 184 Pac. 2d 323.) And the administrative proceeding itself must be conducted pursuant to statutory procedural provisions, substantial compliance with which is jurisdictional. (*National Auto. & Cas. Ins. Co. v. Downey,* 98 Cal. App. 2d 586, 220 Pac. 2d 962.)

Consequently this matter reduces itself to the simple question of whether petitioner has a right to preliminary injunction guaranteed by the United States Con-

stitution, or whether it must seek a different remedy prescribed by the State law, which gives it opportunity to be heard and a judicial review.

To this, we submit, there can be but one answer: The loss or damage involved certainly is not as great as would be involved were this a seizure of the petitioner's business without a prior hearing (*State Savings, etc. Bank v. Anderson,* 238 U.S. 611; *Title Guaranty & S. Co. v. Allen,* 240 U.S. 136; *Neblett v. Carpenter,* 305 U.S. 297), and there is no such constitutional right in a particular form of remedy (*Gibbes v. Zimmerman,* 290 U.S. 326; *Insurance Co. v. Glidden Co.,* 284 U.S. 151; *Crane v. Hahlo,* 258 U.S. 142).

Consequently, apart from the concurrence of Federal and California law on the principle of exhaustion of administrative remedies, no federal question is presented by the application of that principle by the California Courts in this particular case.

Dated, San Francisco, California,
January 17, 1955.

Respectfully submitted,

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